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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WAYNE VANVLECK,

Defendant and Appellant.

H034785

(Monterey County
Super. Ct. No. SS070594)

Defendant Michael Wayne Vanvleck challenges an order requiring him to submit to testing for acquired immune deficiency syndrome (AIDS). Accepting concessions by both parties, we conclude that the order must be reversed and the matter remanded for further proceedings.

BACKGROUND

In January 2007, defendant was charged by criminal complaint with four counts of committing lewd acts on a child under the age of fourteen. (Pen. Code, § 288, subd. (a).)¹ The charges were based on the victim's report that defendant had molested her at least four times, starting just before her 12th birthday in August 2001. Each time, the defendant had rubbed the victim's vagina, with no penetration. Additionally, the victim

¹ Further unspecified statutory references are to the Penal Code.

reported, defendant had “put his mouth on her breast” and “was ‘chasing’ her nipple with his tongue” during one incident.

In August 2007, defendant entered a no contest plea to the first count as charged, conditioned on a grant of felony probation. In October 2007, defendant was sentenced to five years’ probation, with other terms, including 365 days in jail.

In August 2009, defendant admitted a probation violation.

In September 2009, the court sentenced defendant to state prison for eight years, the upper term. The court also ordered defendant to submit to AIDS testing, pursuant to section 1202.1.

DISCUSSION

In his opening brief, defendant argues (1) the testing order constitutes an unauthorized sentence, since there is no statutory basis for it; (2) despite the lack of objection below, the issue is not forfeited; and (3) this court should strike the offending order. In their response brief, the People concede the first two points but they disagree about the remedy, citing California Supreme Court authority requiring remand. In his reply brief, defendant concedes that the People are correct concerning the remedy.

As we now explain, the parties’ concessions are proper, and we therefore adopt them here. We thus conclude (1) defendant’s challenge to the AIDS testing order is not forfeited, (2) the order must be reversed for lack of evidentiary support, and (3) the matter must be remanded to permit further proceedings.

1. Forfeiture

At the sentencing hearing, defense counsel did not object to the order for AIDS testing. Defendant nevertheless argues that there is no forfeiture because the order constitutes an “unauthorized sentence,” which can be challenged on appeal even in the absence of an objection below. The People concede that forfeiture principles do not

apply to a claim of insufficient evidence to support a finding of probable cause to order AIDS testing under section 1202.1, a point established by the California Supreme Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119.

As stated in *Butler*, “a defendant may challenge the sufficiency of the evidence even in the absence of an objection. Without evidentiary support the order is invalid.” (*People v. Butler, supra*, 31 Cal.4th at p. 1123.) Defendant's challenge thus is not forfeited.

2. Propriety of the Order

Section 1202.1 requires the trial court to order designated persons “to submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction.” (§ 1202.1, subd. (a).) Among those designated are persons convicted of lewd conduct on a child in violation of section 288, “if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]” (§ 1202.1, subd. (e)(6)(A).) The statute directs a court ordering such testing to “note its finding on the court docket and minute order if one is prepared.” (*Id.*, subd. (e)(6)(B).)

Defendant contends that there is insufficient evidence to support the probable cause finding required by section 1202.1, and the People concede the point. Both parties are correct.

Although the trial court did not specifically articulate its reasons for the AIDS testing order, we will presume an implied finding by the court of probable cause. (*People v. Butler, supra*, 31 Cal.4th at p. 1127.) “Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid

capable of transmitting HIV has been transferred from the defendant to the victim.”
(*Ibid.*)

Here, the only evidence suggesting transfer of bodily fluids is defendant’s mouthing of the victim’s breast, which could have transferred his saliva. But HIV is not transmitted through saliva contact, according to information from the National Center for Disease Control and Prevention (CDC). (CDC, Basic Information about HIV and AIDS, <<http://www.cdc.gov/hiv/topics/basic/index.htm#spread>> [as of June 24, 2010].) The CDC does note: “There is an extremely remote chance that HIV could be transmitted during ‘French’ or deep, open-mouth kissing with an HIV-infected person if the HIV-infected person’s mouth or gums are bleeding.” (*Ibid.*) There is no evidence of that conduct here, however.

Absent specific facts not presented on this record, we agree with the parties that the possible transfer of saliva here does not constitute probable cause that a “bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim” as required by the statute. (§ 1202.1, subd. (e)(6)(A); cf. *People v. Caird* (1998) 63 Cal.App.4th 578, 590 [evidence of genital-to-genital contact sufficient to support a finding of probable cause for AIDS testing].) Because the record lacks sufficient evidence to support the requisite statutory finding of probable cause, the order for AIDS testing must be reversed.

3. Remedy

We next consider the appropriate remedy. The People urge us to remand for further proceedings. In defendant’s view, “remand will be a waste of judicial resources, since there is no possibility of any additional evidence on the issue being presented.” Defendant nevertheless acknowledges the controlling authority for remand in *People v. Butler, supra*, 31 Cal.4th 1119. (See *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As the California Supreme Court stated in *Butler*: “Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause.” (*People v. Butler, supra*, 31 Cal.4th at p. 1129.) The appropriate remedy thus is “to remand the matter for further proceedings at the election of the prosecution.” (*Ibid.*)

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to permit the prosecution the opportunity to offer evidence to support an AIDS testing order.

McAdams, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.